The appellant contended that the 'day' for all their shift workers started at 7.00am, the start of the first shift. Even for the shift worker who started work at 3.00pm his 'day' was also from 7.00am that day. This had been fixed by the company. Therefore Abbas and Teoh had not worked for more than 12 hours in one 'day'.

A 'day' for a shift worker is a continuous period of 24 hours beginning at any point of time. 'At any point of time' means the time he starts his work on a particular day. If he starts his work at 7am on a certain day, a 'day' in relation to him will be a continuous period of 24 hours from that time. If on another day he starts his work at 11.00pm his 'day' will be a continuous period of 24 hours from that time. An employer cannot fix the 'day' for his shift workers.

Abbas started work at 3.00pm on 6 April 1986. The 'day' in relation to him was therefore a continuous period of 24 hours from 3.00pm on 6 April 1986. His 'day' ended at 3.00pm on 7 April 1986. During this period he worked for 16 hours. Teoh's 'day' was from 3.00pm on 28 April 1986 to 3.00pm on 29 April 1986. Teoh also worked for 16 hours during this period.

The other ground of appeal was that the learned magistrate did not give effect to s 60A(2) of the Act.

Section 60C(2) starts with the words 'Except in the circumstances described in s 60A(2)(a), (b), (c), (d) and (e) no employee...'

It was contended (and it was admitted by Teoh) that Teoh worked on 29 April 1986 from 7.00am to 3.00pm because he wanted to help his friend. He changed his shift with a friend. The change was allowed by the appellant because it had no choice. If a request for change was not allowed the employee could just absent himself and that would cause an interruption of work. It was submitted that the appellant was therefore justified under s 60A(2)(e).

I did not agree to this. Section 60A(2)(e) is not meant for a situation like this. It is meant for a situation where there is an interruption of work which is impossible to foresee. Here, the interruption, if any, was clearly foreseeable.

For the above reasons I dismissed the appeal.

Appeal dismissed.

Solicitors: *TM Varughese & Co.*

Reported by *Ng Sheau Jiuan*

Ghulam Mohammad Sayeed & Ors v Perwira Habib Bank (Malaysia) Bhd & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO D4-22-206-88
ZAKARIA YATIM J
19 DECEMBER 1988

Civil Procedure – Ex parte application – Injunction – Order in terms – Draft order not in terms of application – Draft order approved – Time prescribed in order for making an application to set it aside – Whether peremptory order – Application made out of prescribed time by defendant to set aside order – Whether defendant precluded from doing so – Defendant also applying for injunction in the proceedings and obtaining Mareva injunction in separate proceedings – Whether estopped from proceeding with instant application – Doctrine of election – Rules of the High Court 1980, O 32 r 6

On 29 September 1988, the plaintiffs in this action filed the writ of summons. On the same date, the first and second plaintiffs filed an application by summons-in-chambers for various orders including for certain injunctions against some of the defendants. The application was heard ex parte the same day by the judge who made an 'order in terms of prayers (a), (b), (c) and (d)' of the summons-in-chambers and then approved a draft order submitted by counsel. In approving the draft order, the judge overlooked the last part of it which read as follows:

'And it is ordered that upon the writ of summons, summons-in-chambers and affidavit-in-support being served on the defendants, they be at liberty to apply to set aside or vary this order within two (2) weeks from the date thereof.'

The order was later signed by the senior assistant registrar of the court. The last part of the order was not in one of the prayers in the summons-in-chambers and the judge had not made such an order after hearing counsel. The judge did not make any order in respect of prayer (d) of the summons-in-chambers which was for further or other relief.

On 25 October 1988, the first defendant applied for an order, inter alia, that: (a) time be extended further to that allowed by the ex parte order to enable the first defendant to make the application; and (b) that the injunction and related orders granted on 29 September 1988 be set aside. At the hearing of the first defendant's application, counsel for the plaintiffs raised a preliminary objection. Counsel relied on the last part of the ex parte order and also submitted that the first defendant, instead of filing the present application within the time prescribed in the last part of the order, had filed an application on 4 October 1988 for an injunction to restrain the plaintiffs from selling the land and goods belonging to the sixth defendant. Also, the first defendant had obtained a Mareva injunction on 28 October 1988 before another judge. It was therefore argued that, having elected to follow other courses instead of filing the present application within the prescribed time, the first defendant was estopped from proceeding with the present application. It was also contended for the plaintiffs that the last part of the order was a peremptory order which should be obeyed by the first defendant.

Held, dismissing the preliminary objection:

(1) Although the ex parte order had been signed by the senior assistant registrar, the court had the inherent jurisdiction to order that the last part of the order be expunged on the ground that it was not prayed for and the court did not make

such order after hearing the ex parte application. Clearly there was an error in this case. The court had the power under its inherent jurisdiction to vary, modify or extend its own order so as to ensure that the purposes of justice are met and correctly to express the intention of the court's order.

(2) It was irrelevant and incorrect to insert the words 'liberty to apply' in the order as the liberty to apply to set aside or vary an ex parte order is inherent in the order.

(3) The last part of the ex parte order was not a peremptory order. A peremptory order is an order by which a person is required to do something within a fixed time or suffer the consequences. A peremptory order must be made in compliance with the Rules of the High Court 1980 or under any other rules. Form 58 of the Rules of the High Court states, inter alia, the returnable date or 'until further order'. The words 'until further order' clearly do not mean that time must be specified for a defendant to apply to set aside an injunction. The last part of the ex parte order was not made pursuant to any law or the Rules of the High Court.

(4) It is the court which must act promptly and there must not be a delay in hearing an application to set aside an ex parte order.

(5) A party may apply to dissolve an interlocutory injunction at any time before judgment in the action, and an interim order may be discharged at any time before the day named. In the present case the ex parte order did not contain any returnable date and the first defendant was therefore at liberty to apply to set aside the injunction at any time before the trial of the action. A delay of 25 days, as in the instant case, was not an inordinate delay. Furthermore, the first defendant had given a reasonable explanation for the delay in that certain changes had to be made to the affidavit in support of the first defendant's application which affidavit contained 23 paragraphs and 60 pages of documents exhibited to it.

(6) From the evidence it was clear that the solicitors for the defendants had consistently informed the solicitors for the plaintiffs that the first defendant would proceed with the application to set aside the ex parte order. There was no evidence that the first defendant wanted to relinquish the present application and that it had so conducted itself as to induce the plaintiffs into thinking that the first defendant was intending to proceed with the application for injunction only. In the circumstances, the doctrine of election did not apply and accordingly the question of estoppel did not arise.

Cases referred to

1 *Thynne* v *Thynne* [1955] P 272 (follld)
2 *William Lawrie* v *George Lees* (1881) 7 App Cas 19 (follld)
3 *Stephen* v *Stephen* [1931] P 197 (follld)
4 *Lim Kit Siang* v *United Engineers (M) Bhd & Ors (No 2)* [1988] 1 MLJ 50 (follld)
5 *Janov* v *Morris* [1981] 1 WLR 1389 (refd)
6 *Hitachi Sales (UK) Ltd* v *Mitsui OSK Lines* [1986] 2 Lloyd's Rep 574 (refd)
7 *Permodalan MBF Sdn Bhd* v *Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 (follld)
8 *Meng Leong Development Pte Ltd* v *Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 (refd)

Legislation referred to

Rules of the High Court 1980 O 32 r 6

Sri Ram (*Joseph Yeo* and *Jeya Mahesan* with him) for the plaintiffs.

DP Naban (*Aznam bin Mansor* with him) for the first defendant.

Robert Lazar for the second, third, fourth and fifth defendants.

Cur Adv Vult

Zakaria Yatim J: This is an application by the first defendant for an order that (a) time be extended further to that allowed by the order granted ex parte on 29 September 1988 (hereinafter referred to as 'ex parte order') to enable the first defendant to make this application; (b) the injunction and related orders granted on 29 September 1988 be set aside; (c) an enquiry be held as to the damages the defendants have suffered as a result of the said order; (d) the costs of and incidental to this application and/or damages assessed to have been suffered by the defendants be paid by the plaintiffs to the defendants in any event; and the writ of summons filed by the plaintiffs be set aside.

At the commencement of the hearing of the application, Mr Sri Ram, counsel for the plaintiffs, raised a preliminary objection. He submitted that the first defendant was not entitled to proceed with the present application. He was relying on the last part of the ex parte order which states:

> And it is ordered that upon the Writ of Summons, Summons-In-Chambers and Affidavit-In-Support being served on the Defendants, they be at liberty to apply to set aside or vary this Order within two (2) weeks from the date thereof.

According to him, the present application should have been filed on or before 14 October 1988. He said that the application was filed only on 25 October 1988, and there was a delay of 11 days in filing the application.

He further submitted that the first defendant, instead of filing the present application within the time prescribed in the last part of the ex parte order, filed another application on 4 October 1988 for an injunction to restrain the plaintiffs from selling the land and goods belonging to the sixth defendant. He said that the first defendant also obtained a Mareva injunction on 28 October 1988 before VC George J vide CSC 23-202-1986. He argued that the first defendant had elected to follow the alternative courses instead of filing the present application within the prescribed time and according to him, the first defendant was estopped from proceeding with the present application.

Mr DP Naban, counsel for the first defendant, submitted that the first defendant has the inherent right to apply to set aside an order made ex parte. He said that the words 'liberty to apply' as contained in the last part of the ex parte order has no relevance to an application to set aside an interim injunction or to vary an order. He

urged the court to expunge the last part of the ex parte order.

In considering the preliminary objection raised by Mr Sri Ram, it is necessary to examine the sequence of events that led to the granting of the ex parte order in question. On 29 September 1988, the plaintiffs filed the writ of summons in this action. On the same date the first and second plaintiffs filed their application by summons-in-chambers on a certificate of urgency. The application was supported by the affidavit of the first plaintiff affirmed on 23 September 1988 and the affidavit of Mr VC Kumar, an advocate and solicitor in the firm of solicitors acting for the plaintiffs, affirmed on the same date.

The application contained a number of prayers: Prayer (a) was to restrain the second, third and fourth defendants from acting as receivers and managers of the sixth defendant, Shiraz Hotel and Restaurant Sdn Bhd ('Shiraz'). Prayer (b) asked for an order to restrain the first defendant from appointing any other person or persons from acting as receivers and managers of Shiraz. Prayer (c) asked for the accounts relating to the affairs of Shiraz, and for a report of the activities of the second, third and fourth defendants. The same prayer asked for an order that the first, second, third and fourth defendants deliver to the first and second plaintiffs all account books, documents and all other movable or immovable properties belonging to Shiraz. Prayer (d) asked that the costs be in the cause and prayer (e) asked for further or other relief as might be just and equitable. The application did not contain any prayer for an order quoted above. The affidavit of the first plaintiff merely prayed for an order in terms of the application.

On the same day I heard the application ex parte in view of the certificate of urgency. After hearing Mr Sri Ram, who represented the plaintiffs, I made an 'Order in terms of prayers (a), (b), (c) and (d) subject to the usual undertaking as to damages.' The same order was later transcribed into the minute sheet of the file by the senior assistant registrar. At the end of the ex parte application, after I had made the order, Mr Sri Ram showed me a draft order for approval. After looking at the draft order I approved it. When I approved the draft order I completely overlooked the last part of the order, which is now being relied upon by the plaintiffs in raising the preliminary objection. The last part of the ex parte order was not in one of the prayers in the summons-in-chambers and I did not make such an order after hearing Mr Sri Ram. I should add here that I did not make any order in respect of prayer (d), which is for further or other relief.

In my opinion, although the ex parte order had been signed by the senior assistant registrar, this court has the inherent jurisdiction to order that the last part of the ex parte order be expunged on the ground that it was not prayed for and I did not make such order after hearing the ex parte application. Clearly there was an error in this case. The court has the power under its inherent jurisdiction to vary, modify or extend its own order so as to ensure the purposes of justice and correctly to express the intention of the court's order: *Thynne* v *Thynne*.[1] In *William Lawrie* v *George Lees*[2] at pp 34-35, Lord Penzance, in his judgment in the House of Lords, said:

> I cannot doubt that under the original powers of the court ... every court has the power to vary its own orders which are drawn up mechanically in the registry ... To vary them in such a way as to carry out its own meaning ... I think that power is inherent in every court.

See also the *Supreme Court Practice* (1988) p 362.

I should add that it was irrelevent and incorrect to insert the words 'liberty to apply' in the order. In *Stephen* v *Stephen*[3] at pp 203-204 Lord Hanworth MR in his judgment said:

> When the matter came before the President the question which arose was whether the words 'liberty to apply' which had been inserted in the registrar's order ought to be expunged. The President directed that those words should be deleted from the order, and it appears to us that he was right in so doing ... But where a party has a right to apply to the court that right is not lost or diminished by the failure to add the words 'liberty to apply' which only refer to procedure ... I agree with the President that the words 'liberty to apply' in the registrar's order are irrelevant and incorrect ...

Although the facts in *Stephen* v *Stephen*[3] are different from the facts of the present case, in my view the passage quoted above is applicable to the present case. See *Lim Kit Siang* v *United Engineers (M) Bhd & 3 Ors (No 2)*,[4] where VC George J rightly said, 'The liberty to apply to set aside (or vary) an ex parte order being inherent, there is no need for any specific provision to be incorporated in the order giving such liberty ...'

Mr Sri Ram further submitted that the last part of the ex parte order is a peremptory order which should be obeyed by the first defendant. In support of his submission he relied on the decision of the English Court of Appeal in *Janov* v *Morris*.[5] In that case the plaintiff issued a writ claiming against the defendant damages for breach of contract. The defendant delivered his defence and counterclaim and then no further step was taken in the action for a period of ten months. On the application of the defendant, the master ordered that the action be struck out unless the plaintiff served his summons-for-directions by a specified date. The plaintiff failed to comply with the order or to offer any explanation for his delay in presenting the action. The master then gave judgment on the counterclaim for the defendant. The plaintiff issued a second writ pleading the same cause of action. The defendant successfully applied to strike out the second action on the ground that it was an abuse of

the process of the court. The Court of Appeal held that the court had a discretion to strike out an action where there had been a failure by a litigant to comply with a peremptory order of the court in the previous action. It was also held that peremptory orders were made to be complied with and not to be ignored and, in the absence of any explanation for the plaintiff's conduct, the court, in the exercise of its discretion, would order that the action be struck out.

In my view the last part of the ex parte order in the present case is not a peremptory order. A peremptory order is an order by which a person is required to do something within a fixed time or suffer the consequences: 45 *Halsbury's Laws of England* (4th Ed) p 553. *Janov* v *Morris*[5] is a good example of peremptory order. A peremptory order must be made in compliance with the Rules of the High Court or under any other rules. See the *Supreme Court Practice* (1988) Vol 1, p 18. See also *Hitachi Sales (UK) Ltd* v *Mitsui OSK Lines*[6] at p 575.

Both Mr Sri Ram and Mr Naban agreed that there is no requirement of law that the last part of the order be included in the ex parte order. Mr Sri Ram however referred to Form 58 of the Rules of the High Court 1980. The Form states, inter alia, the returnable date or until further order. The words 'until further order' clearly do not mean that time *must* be specified for the defendant to apply to set aside the injunction. I agree with both counsel that the last part of the ex parte order quoted above was not made pursuant to any law or the Rules of the High Court.

In the circumstances, I order that the last part of the ex parte order be expunged.

Since the last part of the ex parte order has been expunged the application for extention of time as contained in prayer (a) no longer arises. However it is necessary to consider whether the question of delay is still a relevant issue. The application was filed on 25 October 1988. The ex parte order was served on the solicitors for the first defendant on 30 September 1988. In other words, the application was filed by the first defendant 25 days from the date the ex parte order was served on the first defendant. Mr Sri Ram submitted that there should not be a delay in applying to dissolve an injunction. One of the authorities cited by him is *Janov* v *Morris*.[5] As already stated, that case dealt with the question of failure to comply with a peremptory order. Duncan LJ in that case said that the court had the discretion to consider the explanation for non-compliance with the peremptory order and also the explanation for the ten months delay. In that case the plaintiff did not give any explanation at all.

In the instant case the question of peremptory order does not arise. However, as in *Janov* v *Morris*,[5] the court has the power to exercise its discretion whether there is inordinate delay in the present case. The Rules of the High Court do not stipulate time limit for a defendant to apply to set aside an injunction. Order 32 r 6 merely provides that the court may set aside an order made ex parte. In *Permodalan MBF Sdn Bhd* v *Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors*,[7] the Supreme Court said that:

> The court should be prompt in exercising its discretionary power to set aside an ex parte order under O 32 r 6 RHC. Delay would defeat the real purpose of the rule.

I think the passage quoted above clearly states that it is the court which must act promptly and there must not be a delay in hearing an application to set aside an ex parte order. It is also implicit in the judgment of the Supreme Court that the inter parte hearing should be heard until the trial of the action.

In my opinion a party may apply to dissolve an interlocutory injunction at any time before judgment in the action, and an interim order may be discharged at any time before the day named. See 24 *Halsbury's Laws of England* (4th Ed) p 611. In the present case the ex parte order does not contain any returnable date and the first defendant is therefore at liberty to apply to set aside the injunction any time before the trial of the action. In my view a delay of 15 days is not an inordinate delay. Furthermore, the first defendant has given a reasonable explanation for the delay. In a letter written by the solicitors for the first defendant to the solicitors for the plaintiffs on 25 October 1988, it is stated:

> We apologize for the delay in the making of this application but this is due to the fact that certain changes have to be made to the affidavit in support.

The affidavit in support contains 23 paragraphs and 60 pages of documents exhibited to it. I am satisfied with the explanation and I do not think that there is inordinate delay in filing the application to set aside the injunction in the circumstances of the present case.

The next question to consider is whether the doctrine of election applies in the present case. Mr Sri Ram submitted that the first defendant had, by its conduct, represented to the plaintiffs that it did not propose to set aside the injunction granted on 29 September 1988. According to him the first defendant had elected to follow one alternative course, viz to file and proceed with an application for an injunction against the plaintiffs. He added that the first defendant had conducted himself in such a way as to convey the impression that he proposed to proceed with one or two mutually exclusive courses of action open to him. According to him the first defendant was estopped from changing his course of action to the detriment of the plaintiffs. Mr Naban, on the other hand, submitted that the doctrine of election did not apply in the present case.

In considering the question of election, it is necessary to ascertain what is the doctrine of election. In *Meng Leong Development Pte Ltd* v *Jip Hong Trading Co Pte Ltd*[8] at p 11 the Privy Council quoted a passage from Spencer Bower and Turner, *The Law Relating to Estoppel By Representation* (3rd Ed) which summarizes the doctrine as applied to the law of estoppel in the following words:

> Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice.

In the present case, the first defendant, besides filing the present application, also filed an application for injunction against the plaintiffs on 4 October 1988. To date that application has not been heard. The first defendant has also obtained a Mareva injunction on 28 October 1988 before VC George J vide CSC 23-202-1986. In the present action the first defendant has two alternative courses of action, that is the present application and the application for an injunction against the plaintiffs. Although the application for injunction was filed earlier than the present application, the solicitors for the first defendant had informed the solicitors for the plaintiffs that the first defendant would proceed with the present application and the solicitors for the plaintiffs were aware of this. In their letter to the solicitors for the plaintiffs dated 3 October 1988, the solicitors for the first defendant stated, inter alia: 'Please also be informed that this letter is without prejudice to any of our clients' rights including the setting aside of the said order.' This letter is exhibited to the affidavit of the first defendant which was filed in support of the application for injunction against the plaintiffs. In another letter to the solicitors for the plaintiffs dated 27 October 1988, the solicitors for the second defendant wrote:

> In respect of this application, we make reference to the conversation between Encik Shahul Amiruddin who appeared on behalf of your clients on 12 October 1988 wherein our Mr NP Naban indicated that we would be filing the application to set aside the injunction and steps would be taken for this application to be heard on 14 and 15 November 1988. Accordingly, we have now taken steps to have this application fixed for hearing on 14 and 15 November 1988 and we now give you notice of the same.

The first plaintiff in his affidavit affirmed on 15 November 1988 acknowledged that he was under the impression that the first defendant would file the present application to set aside the injunction. Paragraph 5 of his affidavit states:

> I am informed by Mr Shahul Amiruddin who appeared as counsel on 12 October 1988 and he confirmed that the conversation with Mr DP Naban took place as stated. I am further informed by Mr Shahul Amiruddin that he gained the impression that the first defendant will file its application to set aside within the time limited by the order dated 29 September 1988 (encl 6) as Mr DP Naban did not request for an extension of time nor did he indicate that he will seek an extension of time.

From the evidence it is clear that from the 4 October 1988 the solicitors for the defendants had consistently informed the solicitors for the plaintiffs that the first defendant would proceed with the application to set aside the ex parte order. There is no evidence that the first defendant wanted to relinquish the present application. There is also no evidence that the first defendant has so conducted himself as to induce the plaintiffs that the first defendant was intending definitely to proceed with the application for injunction only. In the circumstances, the doctrine of election does not apply in the present case and accordingly the question of estoppel does not arise.

I therefore dismiss the preliminary objection with costs.

Order accordingly.

Solicitors: *Sri Ram Zulkifly & Kumar*; *Jeya Mahesan & Co*; *Skrine & Co*; *Shearn Delamore & Co.*

Reported by *PS Ranjan*